

ORIGINAL

RECEIVED  
FEB 10 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Applications of Paging Network, Inc. ) WT Docket No. 99-365  
and Arch Communications Group, Inc. ) DA 99-3028  
for the Transfers of Control of Their )  
Radio Licenses )

To: The Commission

**JOINT OPPOSITION TO PETITIONS TO DENY AND  
REPLY TO COMMENTS**

Paging Network, Inc. ("PageNet") and Arch Communications Group, Inc. ("Arch") (collectively "Applicants") hereby jointly oppose the Petitions to Deny filed by Teletouch Licenses, Inc. and Mobile Phone of Texas, Inc. (collectively "Petitioners") and reply to the comments filed by Metrocall, Inc. in response to the above-referenced transfer of control application and associated waiver request.<sup>1</sup> At the outset, Applicants note that no party challenged the merger itself. Petitioners challenge only the temporary waiver of Section 24.101(a) sought by Applicants, whereas Metrocall supports grant of the referenced application and the temporary waiver.

---

<sup>1</sup> Section 24.101(a) stipulates that no party may have an ownership interest in more than three NPCS licenses in any geographic area. 47 C.F.R. § 24.101(a) ("NPCS Spectrum Cap"). Because PageNet holds three NPCS licenses and Arch holds two such licenses, the spectrum aggregation limit would be exceeded by the proposed merger absent divestiture or grant of a temporary waiver of the rule.

OK4

**I. THE PETITIONS TO DENY FAIL TO ESTABLISH A PRIMA FACIE CASE THAT GRANT OF THE REQUESTED WAIVER WOULD NOT SERVE THE PUBLIC INTEREST**

The Commission undertakes a two-step analysis for judging the sufficiency of a petition to deny.<sup>2</sup> First, the Commission determines whether the petition and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest. During this step, the Commission assumes that the specific facts set forth by the complaining party are true, without reference to contrary evidence,<sup>3</sup> provided the facts alleged are supported by the affidavit of a person with knowledge of the facts alleged.<sup>4</sup> Allegations that consist of "ultimate, conclusory facts or more general affidavits . . . are not sufficient."<sup>5</sup> If a petition satisfies the threshold standard to make a prima facie case, the inquiry proceeds to a second phase. In that phase, the Commission determines whether, on the basis of the application, the pleadings, and other matters which it may officially notice, a substantial and material question of fact is presented. If there are no substantial and material questions, and the Commission is able to find that the application would be in the public interest, the application is granted.<sup>6</sup> Here, Petitioners have failed to satisfy either prong of this analysis.

---

<sup>2</sup> See *Astroline Communications v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

<sup>3</sup> *Id.* at 1561.

<sup>4</sup> 47 U.S.C. § 309 (d)(1).

<sup>5</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, n. 11 (D.C. Cir. 1987).

<sup>6</sup> 47 U.S.C. § 309.

First, although styled as petitions to deny, Petitioners do not challenge the proposed merger. Petitioners instead request that the Commission require Applicants to divest the spectrum necessary to come into compliance with the NPCS spectrum cap.<sup>7</sup> The only contested issue is whether grant of a waiver is warranted. Moreover, none of the allegations raised by Petitioners contain the required underlying support. The allegations are speculative and unsupported and, as a result, do not establish the prima facie case required under the first step of the Commission's analysis.<sup>8</sup>

Second, even if the "facts" alleged by Petitioners were deemed sufficient to satisfy the first step in the Commission's analysis, they fail to raise a substantial and material question with respect to the proposed merger. As previously stated, Petitioners do not oppose the proposed merger. Accordingly, the Commission should grant the merger and summarily reject the petitions to deny.

**A. Contrary to the Unsubstantiated Allegations of Petitioners, Paging Providers Do Compete With Broadband CMRS Providers**

Petitioners claim that Applicants' waiver request should be rejected because paging licensees do not compete with broadband CMRS providers.<sup>9</sup> This claim is both factually unsupported and inconsistent with every independent analyst report of which Applicants are

---

<sup>7</sup> Teletouch Petition at 4; Mobile Phone Petition at 4.

<sup>8</sup> *Rocky Mountain Radio Co.*, 1999 LEXIS 4751 (October 1, 1999); *KOLA, Inc.*, 11 F.C.C.R. 14297 (1996) (citing *Beaumont Branch of NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988)); *Texas RSA 1 Limited Partnership*, 7 F.C.C.R. 6584, 6585 (1992).

<sup>9</sup> Teletouch Petition at 4-5; Mobile Phone Petition at 4-5.

aware.<sup>10</sup> The Commission itself acknowledges that paging carriers face growing competition from other segments of the wireless industry.<sup>11</sup>

As Applicants noted in their application, paging and wireless two-way voice services have traditionally been complementary services offered over separate end user devices. Paging subscribers often would subscribe to cellular service so that they could respond to pages. Application at 13. This complementary relationship has been undermined by the introduction of handsets by broadband PCS, digital cellular, and enhanced SMR providers (collectively “broadband CMRS”) that combine both paging and two-way voice capabilities. These handsets effectively eliminate the need for a broadband CMRS subscriber to obtain service from a traditional stand-alone paging licensee.

Applicants do not contest Petitioners’ assertions that “most subscribers to wireless telecommunications services opt for broadband services in order to obtain two-way voice communications” and that “most customers would purchase their broadband services regardless of whether the service provider also bundled paging as an ancillary service.”<sup>12</sup> Applicants merely disagree with the conclusions drawn by Petitioners — that these statements indicate that paging and broadband CMRS providers do not compete.<sup>13</sup> These providers do compete because

---

<sup>10</sup> Applicants cited a number of these reports in their application. Application at 16-21.

<sup>11</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report*, FCC 99-136, at 41, 46 (June 24, 1999) (“*Fourth Report*”).

<sup>12</sup> Teletouch Petition at 5; Mobile Phone Petition at 5.

<sup>13</sup> Applicants also dispute Petitioners claims that the 929/931 MHz paging auctions will not produce new entrants. Teletouch Petition at 7-8; Mobile Phone Petition at 7-8. Petitioners  
(continued...)

whenever a customer purchases broadband services bundled with an ancillary paging component, the customer often is no longer in the market for paging service.

Moreover, to the extent traditional paging subscribers view the ability to have two-way voice services as a complement to their digital messaging service as an expansion of the scope of services available for one price, they may discontinue their traditional paging service in favor of the combined service offering. Given this reality, paging licensees must develop new and innovative features and pricing plans to convince consumers to purchase messaging services from them, separately, rather than on an integrated basis only from broadband CMRS providers. Clearly, this will be difficult, if not impossible, absent additional spectral resources. Conversely, it is extremely easy for broadband carriers to offer traditional paging services over their existing spectrum for little or no incremental cost because, as Petitioners recognize, “traditional paging messages require less bandwidth.”<sup>14</sup> Applicants wish to differentiate themselves from the broadband paging offerings by providing information-rich services that require more bandwidth. These services, such as Internet access, will provide Applicants with an opportunity to meet the rapidly growing demand for mobile data — an opportunity that cannot be met absent a waiver or removal of the spectrum cap.

---

<sup>13</sup> (...continued)

claimed that, with the exception of uninformed speculators, 929/931 auction participants generally would be limited to “incumbents seeking to protect their existing frequency assignments and expand their service area” and that “[i]t is not very likely that there will be many new entrants. . . .” Teletouch Petition at 8; Mobile Phone Petition at 8. Despite these claims, Petitioners themselves are scheduled to participate in the 929/931 MHz auctions and are seeking to obtain these frequencies apparently for the first time in many markets. If successful, Petitioners will represent some of the very new entrants they claimed would not exist.

<sup>14</sup> See, e.g., Mobile Phone Petition at 5.

In order to provide these new information-rich services and features, paging licensees need additional spectrum. Accordingly, Applicants seek a waiver of the NPCS Spectrum Cap in order to improve their ability to compete with broadband CMRS providers.

**B. Contrary to Petitioners' Claims, Retention of the Broadband CMRS Spectrum Cap Does Not Indicate that Spectrum Caps Are Necessary in Competitive Markets**

Petitioners claim that the Commission's recent retention of the broadband CMRS spectrum cap undermines Applicants' position that the "spectrum caps serve no significant purpose in competitive markets."<sup>15</sup> Petitioners are mistaken. In retaining the broadband CMRS spectrum cap, the Commission took the view that the broadband CMRS market was not yet fully competitive.<sup>16</sup> The Commission also noted that it would reevaluate the state of competition in the CMRS industry and the corresponding need for the cap as part of its biennial review process.<sup>17</sup> Thus, the FCC's retention of the broadband CMRS spectrum cap does not indicate that spectrum caps remain necessary in competitive markets as Petitioners claim.

In contrast to the broadband CMRS market, the Commission has found the paging market "highly competitive."<sup>18</sup> In fact, the paging market "constitute[s] the most intensively competitive sector of the telecommunications industry, with an average of 29 facilities-based paging carriers

---

<sup>15</sup> Teletouch Petition at 8; Mobile Phone Petition at 8.

<sup>16</sup> *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order*, 17 CR 404, ¶¶ 20-39 (1999).

<sup>17</sup> *Id.* at ¶¶ 4, 26, 39.

<sup>18</sup> *Fourth Report*, FCC 99-136, at 46.

in the top markets.”<sup>19</sup> Applicants stand by their assertion that spectrum caps are unnecessary in such a highly competitive environment. The Commission’s decision to revisit the need for the broadband CMRS spectrum cap in light of changing competitive conditions as part of its biennial review supports this conclusion.<sup>20</sup>

Moreover, certainly Petitioners understand that the retention of the broadband CMRS spectrum cap is due, at least in part, to the fact that broadband PCS carriers are not yet operational on all of the available blocks in most markets. Similarly, although broadband providers compete with paging and narrowband PCS providers with respect to paging customers, these providers do not compete with one another with respect to two-way voice traffic because paging and narrowband providers do not have sufficient spectrum to offer voice services.

## **II. APPLICANTS ARE SEEKING ONLY A TEMPORARY, CONDITIONAL WAIVER OF THE NPCS SPECTRUM CAP, PENDING FURTHER COMMISSION ACTION**

Metrocall’s comments create some confusion regarding the waiver sought by Applicants. Specifically, Metrocall opposes grant of a “permanent or open-ended waiver” of the NPCS Spectrum Cap and urges the Commission to grant “a limited waiver pending the outcome of its current NPCS rulemaking” in GEN Docket No. 90-314.<sup>21</sup> Applicants do not request a permanent or open-ended waiver, however. Rather, Applicants request a waiver of the NPCS cap “*pending completion of the proceedings in GEN Docket No. 90-314*” — the same rulemaking referenced by Metrocall.

---

<sup>19</sup> Metrocall Comments at 2 (citing *Fourth Report*, FCC 99-136, at 46).

<sup>20</sup> *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order*, 17 CR 404, ¶¶ 4, 26, 39.

<sup>21</sup> Metrocall Comments at 6.

Applicants agree with Metrocall that “the NPCS cap is no longer necessary to preserve competition.” and that the Cap should be eliminated expeditiously.<sup>22</sup> In the interim, however, Applicants should be granted a temporary waiver pending the outcome of the outstanding NPCS rulemaking. As Metrocall noted, “the Commission has an obligation to treat similarly-situated [a]pplicants in a similar manner.”<sup>23</sup> The Commission has granted at least six waivers of spectrum caps pending the outcome of proceedings that may result in the modification or elimination of the need for divestiture.<sup>24</sup> Applicants should be afforded similar treatment. Applicants have invested substantial sums of money purchasing the subject NPCS licenses and constructing NPCS systems. This money cannot be recouped in the current marketplace if Applicants were forced to divest. Thus, it would be patently unfair to require Applicants to divest when the Commission may eliminate the NPCS Spectrum Cap in the near future.

Applicants recognize that the Commission denied a similar waiver request associated with Arch’s acquisition of MobileMedia Corporation based, in part, on a determination that the “rulemaking here does not even specifically propose to modify the rule in question.”<sup>25</sup> There are significant reasons, however, why the determination not to grant the MobileMedia waiver does not dictate the Commission’s action in the instant matter.

---

<sup>22</sup> Metrocall Comments at 2-6.

<sup>23</sup> Metrocall Comments at 4 (citing *Green Mountain Mobilephone v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985)).

<sup>24</sup> See Application at 49-51 (citing various waiver grants).

<sup>25</sup> *Mobile Media Corporation*, 14 F.C.C.R. 8017, ¶ 35 (1999). The Commission also asserted that the “mere possibility that a rule may be reexamined does not by itself warrant grant of a waiver.” *Id.* Accord Teletouch Petition at 4; Mobile Phone Petition at 4.



As discussed in the subject application, the issue of whether to eliminate the narrowband PCS spectrum aggregation limit was in fact raised in the *Narrowband PCS Further Notice*.<sup>26</sup> Specifically, in the context of its proposal to channelize and license the reserve narrowband PCS spectrum, the Commission requested comment on the narrowband PCS aggregation limit and whether it should “modify, increase or eliminate such aggregation limits.”<sup>27</sup> Several parties commenting in response to the *Narrowband PCS Further Notice* agreed that the current narrowband PCS spectrum cap rules should be modified, regardless of whether the Commission adopted its channelization proposal.<sup>28</sup> Thus, the question of whether to modify or eliminate the narrowband PCS spectrum aggregation limit was directly raised by the Commission and addressed by commenters in the rulemaking. Accordingly, consistent with prior Commission practice, Applicants should be granted a waiver of the NPCS spectrum cap pending the outcome of the NPCS rulemaking.

## CONCLUSION

No party has opposed the proposed merger of Arch and PageNet. Accordingly, Applicants respectfully urge the Commission to approve the subject transaction without delay. The only issue challenged by Petitioners is whether the Applicants are entitled to a temporary waiver of the NPCS spectrum cap. For the reasons discussed above, as well as the arguments

---

<sup>26</sup> See Application at 46-51. See also Metrocall Comments at 3 (noting that the Commission can immediately eliminate the NPCS cap because the *Narrowband PCS Further Notice* requested comment on the issue and several parties addressed the issue).

<sup>27</sup> *Narrowband PCS Further Notice*, 12 F.C.C.R. 12972, 12991 (1997)

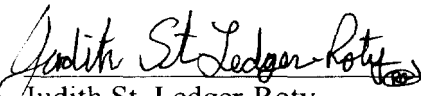
<sup>28</sup> See Application at 46-48 (citing commenters).

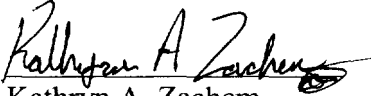
raised in the merger application, Applicants submit that a temporary waiver of the NPCS spectrum cap pending the conclusion of the outstanding rulemaking in GEN Docket No. 90-314 is warranted.

Respectfully submitted,

**PAGING NETWORK, INC.**

**ARCH COMMUNICATIONS GROUP, INC.**

By:   
Judith St. Ledger-Roty  
Paul D. Madison  
Michael Francesconi

By:   
Kathryn A. Zachem  
Kenneth D. Patrich  
Robert G. Kirk

KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street, NW  
Washington, DC 20036  
(202) 955-9600

WILKINSON BARKER KNAUER, LLP  
2300 N Street, NW, Suite 700  
Washington, DC 20037-1128  
(202) 783-4141

Its Attorneys

Its Attorneys

David P. Gamble  
Executive Vice President,  
External Affairs

Patricia A. Gray, Esq.  
Executive Vice President and  
General Counsel

PAGING NETWORK, INC  
14911 Quorum Drive, Suite 600  
Dallas, TX 75240  
(972) 801-0306

Paul H. Kuzia  
Executive Vice President,  
Technology and Regulatory Affairs

ARCH COMMUNICATIONS GROUP, INC.  
1800 West Park Drive, Suite 250  
Westborough, MA 01581  
(508) 870-6600

Date: February 10, 2000

## CERTIFICATE OF SERVICE

I, Brooke Wilding, hereby certify that on February 10, 2000, copies of the foregoing  
“Joint Opposition to Petitions to Deny and Reply to Comments” in WT Docket No. 99-365/DA  
99-3028 were served by U.S. Mail, first class postage pre-paid, on the following parties:

Lauren Kravetz  
Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 4 - A163  
Washington, D.C. 20554

Ramona Melson  
Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 4 - C237  
Washington, D.C. 20554

Jeanette Spriggs  
Satellite Engineering Branch  
Satellite Division  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 7 - A455  
Washington, D.C. 20554

Frederick M. Joyce  
Christine McLaughlin  
Alston & Bird, L.L.P.  
601 Pennsylvania Avenue, N.W.  
North Building - 11th Floor  
Washington, D.C. 20004

Harold Mordkofsky  
Richard D. Rubino  
Blooston, Mordkofsky, Jackson  
& Dickens  
2120 L Street, N.W., Suite 300  
Washington, D.C. 20037

International Transcription Service, Inc.\*  
445 12th Street, S.W., CY - B402  
Washington, D.C. 20554

  
Brooke Wilding

\*Diskette also included